

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**TYSON FOODS, INC., *et al.*,**

**Defendants.**

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**Case No. 4:05-CV-329-GKF-PJC**

**STATE OF OKLAHOMA’S MOTION FOR SANCTIONS DIRECTED  
TO THE CARGILL DEFENDANTS FOR DISCOVERY MISCONDUCT**

Pursuant to Federal Rules of Civil Procedure 16(f), 26(e), 26(g) and 37(c), and the Court’s inherent powers, the State of Oklahoma (“State”) respectfully moves the Court to sanction the Cargill Defendants (“Cargill”) for discovery misconduct.

Among the materials Cargill produced to the State on July 27, 2009, as ordered by the Court (Dkt. #2356) following the State’s motion to compel (Dkt. #2011), were a “Summary of Cargill Grower Farming Operations” (“Grower Summary”) and a chart of the frequency and amounts of Cargill grower land applications within the Illinois River Watershed (“IRW”) (“Applications Chart”).<sup>1</sup> These documents — which are responsive to the State’s discovery, which have been in Cargill’s attorneys’ possession since at least November 2005 and March 2006, respectively, and which were never previously produced — directly contradict sworn statements made by Cargill in interrogatories and at deposition. Moreover, Cargill has perpetuated these false statements as evidence in support of its motion for summary judgment

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<sup>1</sup> Copies of the Grower Summary and Applications Chart are attached as Exhibits A and L, respectively, to the State’s Motion for Leave of Court to Supplement Summary Judgment Record (Dkt. #2452). References hereinafter to *lettered* exhibits as “Ex. [letter]” are to exhibits listed in and attached to Dkt. #2452. References hereinafter to *numbered* exhibits as “Ex. [number]” are to exhibits attached hereto.

(Dkt. #2079) and in response to the State's motion for summary judgment (Dkt. #2200).

Therefore, by this Motion, the State respectfully requests that the Court:

- (1) direct that, for the purposes of this action — including summary judgment and trial — it shall be established fact that Cargill has placed poultry waste in a location where it is likely to cause runoff or pollution of the State's waters;
- (2) prohibit Cargill from introducing evidence or argument that it or its independent contractors have not placed any poultry waste in a location or locations where it is likely to runoff or pollute the State's waters;
- (3) prohibit Cargill from introducing evidence or argument that the State lacks evidence of Cargill-specific waste disposal practices or causation;
- (4) strike Cargill's motion for summary judgment (Dkt. #2079) and its response to the State's motion for summary judgment (Dkt. #2200);
- (5) require Cargill and/or its attorneys to pay the State's reasonable expenses, including attorney's fees, caused by Cargill's misconduct; and
- (6) grant whatever other relief the Court deems just given the circumstances.

## **I. BACKGROUND**

As set forth on pages 1-8 of the State's Motion for Leave of Court to Supplement Summary Judgment Record (Dkt. #2452), the Grower Summary and Applications Chart contain highly relevant information regarding the land application practices of thirty-four (34) of Cargill's Illinois River Watershed ("IRW") contract growers, including: (1) the names of the contract growers; (2) the location of each farm; (3) the size of each farm (in acres); (4) the number of birds raised on each farm; (5) the types of birds raised on each farm; (6) the amount of poultry waste annually generated at each farm; (7) whether, how much, and when poultry waste is land applied on or near each farm; (8) whether the growers sell all or some of the poultry waste; and (9) the identities of the purchasers of that poultry waste.

Despite knowing the lion's share of this information — which is set forth in the Grower Summary — since the fall of 2005 (*see* Ex. F (counsel's 11/03/05 e-mail attaching same)) and

the timing and frequency of the poultry waste applications — which is detailed in the Applications Chart — since the spring of 2006 (*see* Ex. \_\_ (counsel’s 01/01/06 e-mail attaching same)), Cargill’s lawyers repeatedly have assured the State and this Court that Cargill does not possess any such information as described below.

On September 13, 2007, the State served on all Defendants certain Interrogatories and Requests for Production (“September 13, 2007 Discovery Requests”). Included in these September 13, 2007 Discovery Requests was Interrogatory No. 6, which requested the following:

For poultry waste generated at your own poultry growing / feeding operations and/or poultry growing / feeding operations under contract with you in the Illinois River Watershed since 1980 that has not been transported out of the Illinois River Watershed, please state, broken down by year, how the poultry waste was disposed of (e.g., land application within the Illinois River Watershed, burning as fuel within the Illinois River Watershed, etc.) and the amount disposed of in each particular manner.

(Ex. G (September 13, 2007 Discovery Requests, Interrog. #6).)

On November 16, 2007, Defendant Cargill Turkey Production, LLC (“CTP”) submitted its Responses to the State’s September 13, 2007 Discovery Requests (“Initial Responses”). In part, CTP responded to the State’s Interrogatory No. 6 as follows:

CTP has ***no information*** regarding the amounts of litter used by its independent contract growers and directs Plaintiffs [sic] to the contract growers themselves for this information.

(Ex. B at 13 (emphasis added).) CTP’s Initial Responses, including its Response to Interrogatory No. 6, were sworn to and verified by H. Steven Willardsen, President of CTP. (*Id.* at 40.) During his deposition, Mr. Willardsen testified that he did not prepare the interrogatory responses, did not have personal knowledge of much of the information provided in those responses, and relied primarily on Mr. Alsup, Mr. Maupin and legal counsel to provide responsive information. (Ex. H (Willardsen Depo. at 137-144).)

On May 13, 2008, CTP submitted its Supplemental Responses to the State's September 13, 2007 Discovery Responses ("Supplemental Responses"). As part of these Supplemental Responses, CTP again asserted that it had "***no information*** regarding the amounts of litter used by its independent contract growers. . . ." (Ex. C at 6 (emphasis added).)

On July 21, 2008, the State took a Rule 30(b)(6) deposition of Cargill. During this deposition, designee Timothy Maupin testified that Cargill "do[es not] track the poultry litter on our contract producers' farms." (Ex. I (7/21/08 Cargill 30(b)(6) Depo. at 84).)

On March 17, 2009, the State served another set of Interrogatories and Requests for Production ("March 17, 2009 Discovery Requests") on CTP. Interrogatory No. 1 asked CTP to:

identify each instance (including, where available, specific date, specific location, tonnage of waste applied, acreage upon which it was applied, and STP before application) in which poultry waste generated at your poultry feeding operations, or at poultry feeding operations under contract with you, has been land applied within the IRW as fertilizer, identifying all witnesses to the application and all documents evidencing it.

(Ex. J at 1.) On April 20, 2009, CTP responded by stating that it had "no additional information responsive to this Interrogatory beyond CTP's supplemental response to Plaintiff's September 13, 2007 Interrogatory 6" and referred the State to that supplemental response. (Ex. D (CTP Responses to March 17, 2009 Discovery Requests at 3).) In other words, by reference, Cargill had for a *third time* certified under penalty of perjury that it had "***no information*** regarding the amounts of litter used by its independent contract growers . . . ." (Ex. C (Supplemental Responses at 6) (emphasis added).)

Finally, on June 18, 2009, Cargill filed papers with this Court asserting that it "do[es] not generally know whether [its] individual contract growers in the IRW land-apply, sell, trade, or

otherwise make use of the poultry litter generated by the Cargill Defendants' turkeys but owned by the growers." Dkt. #2200 at 5.

In light of the Grower Summary and Applications Chart, it is clear that that these statements — some made under penalty of perjury — were demonstrably false. Less than two months before trial — and after the completion of dispositive motion briefing — the State has learned that, in fact, Cargill has for years been concealing extensive information regarding the specific locations and amounts of poultry waste disposed of by its contract growers within the IRW. Were it not for Cargill's concealment of — and untruthfulness concerning — this pertinent information, the State could have relied upon it in support of its Motion for Partial Summary Judgment (Dkt. #2062), in its Response to Cargill's Motion for Summary Judgment (Dkt. #2178), and in its depositions of Cargill experts Davis and Murphy. Instead, Cargill has foreclosed the State from using that information to conduct expert investigations, take depositions, and otherwise propound discovery.<sup>2</sup>

## **II. ARGUMENT**

By withholding the Grower Summary and Applications Chart — and, indeed, misrepresenting their existence and denying knowledge of their contents — Cargill wrongfully has deprived the State of responsive and highly probative evidence regarding poultry waste produced in association with Cargill's operations, to wit: (1) the names of the contract growers; (2) the location of each farm; (3) the size of each farm (in acres); (4) the number of birds raised on each farm; (5) the types of birds raised on each farm; (6) the amount of poultry waste annually generated at each farm; (7) whether and how much poultry waste is land-applied on or

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<sup>2</sup> It bears noting, for example, that, while the Grower Summary and Applications Chart address an extensive amount of information, they do not reveal the sources of that information.

near each farm<sup>3</sup>; (8) whether the growers sell all or some of the poultry waste; and (9) the identities of the purchasers of that poultry waste. This information is relevant to State's case against Cargill for their waste disposal practices and the resulting phosphorus and bacterial loading to the IRW.

At the same time, in its summary judgment papers, Cargill has represented to this Court that the State had failed to meet its burden to come forward with the very same information it possessed, gathered and summarized in writing at least as early as November 2005 in the Grower Summary. Cargill's obstruction of discovery, including its false statements in interrogatory responses and its nonproduction of the Grower Summary and Applications Chart, as well as the false and misleading answers of its Rule 30(b)(6) deposition designees, warrants the sanctions requested herein.

A party who has responded to an interrogatory or request for production in an incorrect or incomplete manner must correct its response in a timely manner. Fed. R. Civ. P. 26(e)(1); *see also* Fed. R. Civ. P. 26(g)(1)(A) (“[b]y signing, an attorney or party certifies that to the best of the person’s knowledge, information and belief . . . with respect to a disclosure, it is complete and correct as of the time it is made”). The failure to correct a response “is functionally indistinguishable from simply making an incorrect response in the first instance; the sanctions that may be imposed by the court are the same in each situation.”<sup>8</sup> Charles Alan Wright, *et al.*, Federal Practice & Procedure § 2050 (2009). Specifically, those sanctions are set forth in

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<sup>3</sup> For instance, the Grower Summary indicates that grower Rick Bickford annually land-applies one-third (or 200 tons) of the poultry waste generated on his farm. It also shows that Cargill grower Joua Moua annually land-applies 100-125 tons of poultry waste on his property in Summers, Arkansas. And the document indicates that Cargill grower Joel Reed applies two tons of poultry waste per acre on his half of his 300 acre property.

Rule 37(c), which states that the court, in response to a party's failure to provide information as required by Rule 26(e):

- (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
- (B) may inform the jury of the party's failure; and
- (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c)(1).

The sanctions available under Rule 37(b)(2)(A)(i)-(vi) include, among other things:

- (1) "directing that . . . designated facts be taken as established for purposes of the action . . .";
- (2) "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence"; and (3) "striking pleadings in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(i)-(iii); *see also* Fed. R. Civ. P. 16(f) (incorporating Rule 37 sanctions); Fed. R. Civ. P. 26(g)(3) (requiring "an appropriate sanction," which "may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation").

Of course, the imposition of sanctions "is a matter within the discretion of the trial court." *Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994). In exercising that discretion, "[c]ourts have . . . invoked Rule 37 to sanction parties for . . . withholding documents properly requested during the course of discovery."<sup>4</sup> *See, e.g., Millsap*, 162 F. Supp. 2d at 1309 (emphasis added). Likewise, courts "may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-

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<sup>4</sup> It bears noting that a sanction under Rule 37 does *not* require a finding of bad faith, but "[d]iscovery violations predicated on willfulness, bad faith, or [some] fault . . . may warrant more severe sanctions. . . ." *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1308-09 (N.D. Okla. 2001) (internal quotation marks omitted). As demonstrated herein, Cargill's misconduct appears to be willful and evidences bad faith, warranting the full panoply of sanctions requested by the State.

(iv), if a party or its attorney . . . fails to obey a scheduling or other pretrial order.”<sup>5</sup> Fed. R. Civ. P. 16(f)(1)(C); see *Royalty Petroleum Co. v. Arkla, Inc.*, 129 F.R.D. 674, 680-83 (W.D. Okla. 1990). And, “[w]hen rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.” *Millsap*, 162 F. Supp. 2d at 1308 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991)); see also *Duncan v. Colo. Dep’t of Corr.*, 15 F. App’x 730, 732 (10th Cir. 2001) (courts have “inherent power to levy sanctions in response to abusive litigation practices” (internal quotation marks omitted)).

In *Millsap*, former employees brought a class action against McDonnell Douglas Corporation (“MDC”), alleging that it had violated ERISA by closing its Tulsa manufacturing and assembly plant for the purpose of depriving its employees of benefits. 162 F. Supp. 2d at 1263-64. Given conflicting testimony regarding MDC’s claimed business justification for closing the plant, the court held an evidentiary hearing to determine whether MDC had destroyed or suppressed documents that reflected the financial basis for the decision. *Id.* at 1283. As a result of that hearing, the court found that MDC had committed a series of discovery violations, including: (1) providing untruthful interrogatory responses; (2) providing untruthful deposition testimony; and (3) failing to produce material documents.

First, while MDC had claimed in response to the plaintiffs’ request that it identify key meetings, personnel, and documents that “it could not identify the meetings leading to the decision to close its Tulsa plant,” *id.*, it turned out that MDC had in its possession, but did not provide, information concerning a crucial meeting in which the final decision was made, *id.* at 1288. Second, the court found that key decision makers “share[d] a startling inability to

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<sup>5</sup> Under the Court’s March 27, 2008 scheduling Order (Dkt. #1658), the deadline with respect to the discovery at issue was April 16, 2009.



remember the details about the decision.” *Id.* Because their depositions conflicted with the record evidence, the court declined to credit the testimony. *See id.* at 1289. Third, MDC failed to produce at least two documents. The first document it never produced, and the court found that MDC’s failure to do so “clearly interfered with the Plaintiffs’ ability to prove their case.” *Id.* The second document MDC produced only after trial, and “the information which was withheld at trial would have materially assisted Plaintiffs in presenting their case and with the discovery process itself.” *Id.* at 1293. In light of these discovery abuses, the court struck MDC’s defense that it had closed the Tulsa plant for financial reasons related to excess capacity and, given the absence of that defense, found for the plaintiffs on the merits of their claim. *Id.* at 1309.

Similarly, the defendant in *Royalty Petroleum* offered “no credible explanation” as to why highly relevant documents disclosed on the eve of trial “could not have been discovered earlier.” 129 F.R.D. at 675, 679. The documents, which were used to refresh a witness’s recollection, were inconsistent with that witness’s prior deposition testimony. *Id.* at 678. Given that the late-disclosed information was favorable to the defendant, the court concluded that the untimely supplement was tantamount to “[throwing] a grenade into plaintiff’s trial camp the night before trial began.” *See id.* at 680. The court preemptively excluded any testimony that was inconsistent with the witness’s deposition testimony, and it sanctioned the defendant’s attorney pursuant to Rules 16(f) and 26(g)<sup>6</sup> by ordering her to pay expenses associated with the misconduct. *Id.* at 685.

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<sup>6</sup> Although the court concluded that Rule 37(b) was not directly applicable because the defendant had not failed to comply with an order compelling an answer or discovery, *id.* at 684, the court noted Rule 16(f)’s cross-reference to the sanctions available under Rule 37(b), *see id.* at 681. *See also* Fed. R. Civ. P. 16(f)(1) (“the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii)).

In the present case, the Grower Summary and Applications Chart are favorable to the State because they establish that Cargill has disposed of a substantial amount of waste in the IRW. Moreover, the amounts, dates and locations of disposal demonstrate that at least two of Cargill's experts — Davis and Murphy — either were not provided or purposefully withheld information concerning the amount and locations of land disposal of Cargill waste in conjunction with their expert analysis as to the effect of Cargill waste application on IRW waters.<sup>7</sup> For example, Dr. Murphy testified:

Q. Did you do any investigation as to where poultry litter is disposed of in the IRW from the poultry farms?

A. Well, I looked at maps for the two Cargill growers, which, as I recall, Randy O'Boyle pointed out to me where he thought there were — there had been poultry litter disposal.

\* \* \*

Q. How did Mr. O'Boyle determine where poultry litter was disposed of from those two farms?

A. I do not know.

Q. Did he identify it for you someplace on a map?

A. He showed me a map, yes.

Q. Do you know what information Mr. O'Boyle used in order to come to those conclusions as to locations of poultry litter disposal?

A. I do not.

Q. Do you know how many Cargill farms, either company owned or independent contractor farms, there are within the IRW watershed?

A. The number I used in my report was 35.

Q. And where did you receive that?

A. I'm thinking it probably was from Cheryl Law.

Q. Do you know where she got that information?

A. I do not.

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<sup>7</sup> The Applications Chart shows that poultry waste is most frequently applied in April and May, which strongly supports the State's position in its Motion for Partial Summary Judgment that "[t]he majority of the land applications of poultry waste occurs between February and June, a period of time when nearly half of the annual rainfall occurs." (Dkt. #2062 at 17.)

- Q. Did you do any investigation as to the locations where poultry litter from the other 33 or so Cargill farms within the IRW have been disposed?
- A. Only to the extent of identifying locations in surface water and groundwater and so on that are downstream or downgradient from the Cargill growers.
- Q. But you don't know whether or not the litter from those particular growers was actually disposed of in the location where their barns are located; correct?
- A. I have not investigated that.
- Q. So you don't know?
- A. I don't know if the litter was used on the farm where the poultry was being grown or whether it was taken off-site, I don't know.
- Q. Would that be important in your evaluation as to whether or not Cargill farms are impacting certain segments of water and groundwater within the IRW?
- A. If we were to start all over and do a proper study, that would be one factor.

(Ex. 1, 03/25/09 Murphy Dep., at 117:15–119:20 (objections omitted).)<sup>8</sup> These questions were posed by the State because Cargill had *not* produced the Grower Summary, Applications Chart, or any other document containing such information and had represented to the State in its discovery responses that it did not possess the information.

Although the Grower Summary and Applications Chart were independently responsive to the State's discovery requests, Cargill did not produce them until forced to do so by the Court's order compelling disclosure of the considered materials of Cargill's expert, Thomas Ginn. That production came after discovery and summary judgment briefing were complete. The Grower

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<sup>8</sup> Dr. Davis also structured his expert report without knowing where waste was land applied. Rather than supply Dr. Davis with the location of the application sites, counsel instructed him to make the barns the focal point of his analysis. (*See, e.g.*, Ex. 2, 04/07/09 Davis Dep., at 81:15–82:3, 84:2–86:16.) In other words, Dr. Davis was asked to assume that land application only takes place on the grower properties even though Cargill was aware that a portion of the poultry waste was sold and land-applied at non-grower locations within the IRW. (*See also* Dkt. #2452 at 6 n.1 (discussing implications of same).)

Summary and Applications Chart directly contradict sworn testimony and statements of fact submitted by Cargill in support of its motion for summary judgment and in opposition to the State's, and they undermine the expert reports of Drs. Davis and Murphy. Specifically, Cargill has sworn on three separate occasions that it has "***no information*** regarding the amounts of litter used by its independent contract growers . . . ." (*See* Ex. B (Defendant Cargill Turkey Production's ("CTP") Resp. to State's 9/13/07 Disc. Req. at 13 (Resp. to Interrog. #6)) (emphasis added); Ex. C (CTP's Suppl. Resp. to State's 9/13/07 Disc. Req. at 6 (Resp. to Interrog. #6)); Ex. D (CTP's Resp. to State's 3/17/09 Interrog. and RFP at 3-4 (Resp. to Interrog. ##1 & 2)) (asserting that CTP had "no additional" responsive information beyond its supplemental response to the State's 9/13/07 Interrog. #6).)

Thus, it is apparent that Cargill had hoped to keep this highly relevant and impeaching information from the State and away from the proceedings before this Court. As in *Royalty Petroleum*, Cargill can offer no other "credible explanation" as to why the Grower Summary and Applications Chart, which are inconsistent with Cargill's prior sworn statements, were not previously disclosed. As in *Millsap*, the Grower Summary and Applications Chart reveal that Cargill provided untruthful interrogatory responses and deposition testimony.

Based on the foregoing conduct, Cargill has violated: (1) Rule 16(f) because it failed timely to produce the Grower Summary and Applications Chart; (2) Rule 26(e) because it made — and, in light of the Grower Summary and Applications Chart, failed to correct — misstatements of fact in its interrogatory responses and Rule 30(b)(6) deposition testimony; and (3) Rule 26(g) because counsel for Cargill certified that Cargill's interrogatory responses were correct even though a reasonable inquiry (i.e., reviewing the Grower Summary and Applications Chart) would have revealed that they obviously were not. Moreover, in light of the Grower

Summary and Applications Chart, Cargill's representation to the Court in the context of summary judgment that it "do[es] not generally know whether their individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants' turkeys but owned by the growers" (Dkt. #2200 at 5) evidences its bad faith.

### III. CONCLUSION

For the foregoing reasons, the Court should:

- (1) direct that, for the purposes of this action — including summary judgment and trial — it shall be established fact that Cargill has placed poultry waste in a location where it is likely to cause runoff or pollution of the State's waters, *see* Fed. R. Civ. P. 37(b)(2)(i);
- (2) prohibit Cargill from introducing evidence or argument that it or its independent contractors have not placed any poultry waste in a location or locations where it is likely to runoff or pollute the State's waters, *see* Fed. R. Civ. P. 37(b)(2)(ii);
- (3) prohibit Cargill from introducing evidence or argument that the State lacks evidence of Cargill-specific waste disposal practices or causation, *see* Fed. R. Civ. P. 37(b)(2)(iii);
- (4) strike Cargill's motion for summary judgment (Dkt. #2079) and its response to the State's motion for summary judgment (Dkt. #2200), *see id.*;
- (5) require Cargill and/or its attorneys to pay the State's reasonable expenses, including attorney's fees, caused by Cargill's misconduct, *see* Fed. R. Civ. P. 16(f)(2), 26(g)(3), 37(c)(1)(A); and
- (6) grant whatever other relief the Court deems just given the circumstances.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on the 12th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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